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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 90

MABEL G. REINECKE, COLLECTOR OF INTERNAL REVENUE for the First District of Illinois, petitioner

v.

THE NORTHERN TRUST COMPANY, AS EXECUTOR UNDER the Last Will and Testament of A. C. Bartlett, Deceased

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS OF THE COURTS BELOW

The District Court did not write an opinion. The opinion of the Circuit Court of Appeals (R. 66) is reported in 24 F. (2d) 91.

GROUNDS OF JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 12, 1927. (R. 69.) Certiorari was granted April 23, 1928. (R. 70.) The

jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Do the words of Section 402 (c) of the Revenue Act of 1921, which provide that, for the purpose of measuring the estate tax, there shall be included in the value of decedent's gross estate trusts intended to "take effect in possession or enjoyment at or after his death," embrace:

(*a*) Trusts created prior to the effective date of the first Act (1916) levying a Federal estate tax, under which the settlor retains the income for his life and the absolute right to revoke the trust, and under which the corpus of the trust can not vest in the beneficiary until at or after the settlor's death. (This applies to Trusts Nos. 1831 and 3048, appearing in the record at pp. 47, 50.)

(*b*) Trusts created after the effective date of a similar and earlier Act, where the settlor reserved the power to sell and reinvest the trust property; vote the stock; control leases; reappoint trustees; and, jointly with the beneficiaries, to alter, amend, or modify the trust. (This applies to Trusts Nos. 4477, 4478, 4479, 4480, and 4481, respectively, appearing in the record at pp. 3, 17, 25, 32, 40.)

2. If the words of Section 402 (c) of the Revenue Act of 1921 do embrace all of these trusts, can that section constitutionally apply to the two trusts created before the first Federal estate tax law became

effective, but under which the settlor reserved the income and the absolute right to revoke? (This applies to Trusts Nos. 1831 and 3048.)

3. Where a trust has been created during the effectiveness of Section 402 (c) of the Revenue Act of 1918 and takes effect in possession or enjoyment at or after the death of the settlor, and during the effectiveness of Section 402 (c) of the Revenue Act of 1921 (an identical section), can its value be included in the gross estate of decedent under the latter section? (This applies to Trusts Nos. 4477, 4478, 4479, 4480, and 4481.)

STATUTES INVOLVED

The Revenue Act of 1921, c. 136, 42 Stat. 227, 277, 278, 321, provides in part as follows:

> SEC. 401. That, in lieu of the tax imposed by Title IV of the Revenue Act of 1918, a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States * * *. (Here follow the rates.)
>
> SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof made by the decedent within two years prior to his death without such a consideration shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; • • •

SEC. 1403. That if any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby.

After the decisions of this Court in the cases of *Nichols* v. *Coolidge*, 274 U. S. 531, and *Shukert* v. *Allen*, 273 U. S. 545, the Bureau of Internal Revenue modified its regulations so as to conform to those decisions. There were, however, certain cases not similar on the facts to those cases and apparently not covered by the principles announced therein. The regulations, which are set out as an appendix to this brief, now provide for the inclusion

of trusts where the enjoyment of the remaindermen is expressly deferred until the founder's death and the trusts are either revocable, and therefore not completed transactions until after the Act was passed, or were taxable under a prior or existing Act in force at the time they were created.

STATEMENT OF THE CASE

The facts of this case, as disclosed by the declaration (R. 1–56), are as follows:

Adolphus C. Bartlett died May 30, 1922. (R. 1.) Prior to his death he created seven trusts. One of these trusts, known for the purpose of identification as Trust No. 4477 (R. 3), was created March 1, 1919, and was not modified during the testator's lifetime. This trust provided that the trustees should collect the income from certain property transferred to them and out of the income pay to the settlor's wife $2,000 per month during the joint lives of the settlor and the wife. (R. 5.) The balance of the income during this period was to be accumulated. After the death of the settlor the wife was to be paid $2,000 per month during her lifetime or until she should become entitled to a share in the decedent's estate, and the balance of the income was to be paid equally to the four children of the settlor or to the issue of such children as might die. (R. 5–6.) The trust was to terminate five years after the donor's death, or at the death of the wife, whichever should last occur. (R. 6.)

At the time the trust terminated the corpus was to be distributed to the settlor's children, or if any child be dead then his share was to go to his then surviving issue, or in default of such children and issue of children to the surviving issue of the settlor. (R. 6.) The settlor reserved the right: (1) To govern the management, sale, or investment of any part of the trust estate (R. 4); (2) to require the trustee to execute such proxies for voting stock as he might wish (R. 4); (3) to control all leases made and other acts done with respect to real estate belonging to the trust (R. 5); (4) to appoint a successor trustee in case of resignation or incapacity (R. 7); and (5) jointly with a majority of the beneficiaries to alter, change, or modify the terms of the trust (R. 7). The trust provided that the beneficiaries should have no power to "anticipate, assign, or otherwise dispose of or encumber their respective interests in said trust estate, and the same shall not be subject to be taken from them by process of law." (R. 7.)

Trust No. 4478 (R. 17) is identical with trusts Nos. 4479 (R. 25), 4480 (R. 32), and 4481 (R. 40), except as to the beneficiaries. These four trusts were created on March 1, 1919, and were amended in certain particulars on June 28, 1921. (R. 17, 25, 32, 40.) As created they provided that the trustee shall receive and collect the income (R. 18, 26, 33, 41), and after paying the expenses of the trust shall accumulate the net income during the lifetime of the donor except so much thereof as the donor shall direct to

be paid to the beneficiary or his issue and after the death of the settlor the income shall be paid to the beneficiary for life, or until the termination of the trust (R. 19, 27, 35, 42). The trust terminates five years after the settlor's death or at the death of the survivor of the beneficiary and settlor. (R. 20, 27, 35, 43.) At the termination of the trust the corpus is to be distributed to the beneficiary or to his appointees under his last will and testament, or if no such appointees, then to the surviving issue of the beneficiary, or, in default of such surviving issue, to the surviving issue of the settlor. (R. 20, 28, 35, 43.) The same powers were retained by the donor as were retained in Trust No. 4477 except the right to modify was exercisable only in conjunction with the single beneficiary. (R. 21, 29, 37, 44.) The same provision as to the anticipation by the beneficiary was made. (R. 21, 29, 36, 44.)

These trusts were modified on June 28, 1921, so that thereafter the income instead of being accumulated was payable to the beneficiary or to the guardian of the issue of such beneficiary in such amounts as such beneficiary or guardian, as the case might be, might ask for during the term of the trust. (R. 22, 30, 37, 45.)

Trust No. 1831 (R. 47) was created February 11, 1903, and provided that the income from the trust fund should be paid to the settlor for his life, and after his death to his daughter, Florence D. Bartlett, until the termination of the trust. One-half of the corpus was to be paid to the daughter when she

reached the age of thirty years, the remainder to be paid to her when she reached the age of thirty-five years (but in no case before the settlor's death). (R. 48.) If the daughter should die before receiving all the corpus then the corpus undistributed was to be paid to the appointees of the daughter named in her last will and testament, or in default of such appointment, then to her heirs at law. (R. 48.) This trust provides (R. 48):

> * * * I reserve the right to have said stock, or its equivalent, or any part or portion thereof retransferred to me, and to cancel the trust hereby created relative thereto, either in whole or in part, and to possess and enjoy said stock and its equivalent, or any part or portion thereof, as though this trust had not been created.

Trust No. 3048 (R. 50) was created December 30, 1910, and in its provisions is substantially identical with Trust No. 1831, except that the beneficiary is another daughter and the distribution is to be made when such daughter reaches the age of fifty years (but in no case before the settlor's death). This trust also provides that the said trustee shall exercise his discretion as to the amount of the income to be paid to the daughter during the term of the trust. (R. 50.)

The Commissioner of Internal Revenue added the value of the property transferred to the trustees of trusts numbered 4477, 4478, 4479, 4480, and 4481 to the value of the decedent's gross estate as returned

by the executors (R. 9, 24, 31, 39, 46), on the theory that the trusts and transfers were intended to take effect in possession or enjoyment at or after decedent's death. The respondent paid under protest and duress the tax assessed by reason of this addition. (R. 11, 24, 32, 39, 47, 52.)

In the return filed the executors included the value of the property transferred to the trustees of trusts numbered 1831 and 3048 and paid the tax thereon. (R. 49, 52.)

A claim for refund demanding the return of the tax paid on account of the inclusion of the value of the property covered by these seven trusts was duly filed by the respondent and rejected by the petitioner, whereupon this suit was instituted in the District Court for the Northern District of Illinois by declaration (R. 1), to which declaration the petitioner demurred (R. 59). The court overruled the demurrer and petitioner electing to stand on the demurrer, judgment was entered in favor of the respondent. (R. 61.) A writ of error was sued out from the Circuit Court of Appeals for the Seventh Circuit (R. 63), which court affirmed the judgment of the court below (R. 69). To review this judgment this Court granted certiorari on April 23, 1928. (R. 70.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred in holding that the trusts created in 1919 were not intended

to take effect in possession or enjoyment at or after death, and further in holding that Congress had no power to include in the gross estate the property in the trusts created in 1903 and 1910, absolute power to revoke which had been reserved to the settlor.

SUMMARY OF THE ARGUMENT

All of the trusts here under review were so drawn that the time at which the corpus of each vested in the beneficiary was measured from the death of the settlor, and as to each of them the settlor reserved certain control and either an unqualified (as to Trusts Nos. 1831 and 3048) or, a joint right with the beneficiaries (as to Trusts Nos. 4477, 4478, 4479, 4480, and 4481), to revoke. These fundamental differences distinguish this case from *Shukert* v. *Allen*, 273 U. S. 545, in which this Court held that irrevocable trusts which terminated at a time having no relation to the death of the settlor were not contemplated under Section 402 (c).

That the section was intended to embrace such trusts as those here present seems clearly indicated by its words. The words "in possession or enjoyment," to mean anything, must infer the additional words "of the corpus" for, to adopt the alternative inference that the section referred to the income would be to place a tax on something that is not only unusual but purely incidental. As this possession

or enjoyment is postponed until "at or after his (the settlor's) death," it can only refer to the possession or enjoyment of the beneficiary, which must be the equivalent of vesting in the beneficiary the corpus in actual possession or enjoyment at or after settlor's death. In the instant case, under all seven of the trusts, that is exactly true. It must follow, then, that the section applies to these trusts. This conclusion is strengthened by reference to the decision of this Court in *Nichols* v. *Coolidge*, 274 U. S. 531. In that case, which arose under an identical section of an earlier Act, and concerned a trust similar, so far as the time of vesting was concerned, to those here involved, this Court held the section, as to features hereinafter discussed, to be unconstitutional. The inference, then, is that the section did apply to the Coolidge trusts. If that is correct, the section here involved must apply to the instant trusts.

As to Trusts Nos. 1831 and 3048, created in 1903 and 1910, respectively, the settlor retained the income during his life and the unqualified right to revoke. The absence of these reservations in the Coolidge trusts impelled this Court to declare the section unconstitutional, in that it attempted to tax, at death, a transaction under which the settlor's interest had ceased prior to death, and which was not testamentary in effect. In the instant case the tax is measured, in fact, as of the time the settlor's

interest ceased, which was only at his death, and the transaction itself, was testamentary in effect.

That five of the instant trusts (Trusts Nos. 4477, 4478, 4479, 4480, and 4481) were created in 1919 while the Revenue Act of 1918 was in effect, and terminated by the death of the settlor while the Revenue Act of 1921 was in effect, is immaterial so far as the application of the rule of the *Coolidge case* is concerned. The reason of that rule is that it is unfair and confiscatory to make the inclusion (and thus the tax) apply to trusts created before there was any such tax. When these trusts were created, a section of the Revenue Act of 1918 identical with the one here invoked was in effect. The settlor created them with full notice of this. The repeal of an Act and its immediate reenactment does not destroy the old Act and create a new one, but the latter is but a continuation of the former. The element of surprise being here eliminated and Congress possessing the power to include trusts created subsequent to the Act, the unconstitutionality shown in the *Coolidge case* does not here exist.

Even were this not true, the reservations of interest retained by the settlor, of control and management, the right to vote stock, or, with others, to revoke the instrument, are sufficient to make inapplicable the rule of the *Coolidge case* to these trusts.

ARGUMENT

I

A TRUST, UNDER WHICH THE CORPUS CAN NOT BE DISTRIBUTED UNTIL AFTER THE DEATH OF THE SETTLOR, IS A TRUST "INTENDED TO TAKE EFFECT IN POSSESSION OR ENJOYMENT AT OR AFTER" THE DEATH OF SETTLOR, WITHIN THE MEANING OF SECTION 402 (c) OF THE REVENUE ACT OF 1921

It is believed that an analysis of all seven of the trusts presented in the instant case will demonstrate that they are of that class of trusts meant by Congress to be embraced within the terms of Section 402 (c) of the Revenue Act of 1921, *supra*.

While differences may exist in the terms of the particular trusts, which will be discussed hereafter in their relation to the final result, all seven of them are substantially alike in that in none of them can the corpus of the trust be distributed to the beneficiaries during the lifetime of the settlor.

Before undertaking an affirmative discussion of this issue, it would seem desirable to first dispose of the case of *Shukert* v. *Allen*, 273 U. S. 545. As the similarities which may seem apparent are only superficial that case may be readily distinguished. There this Court held that the trust involved did not come within the terms of Section 402 (c) of the Revenue Act of 1918, which is in identical language with the same section of the 1921 Act here under discussion. The distinctions between the

trust there and the seven trusts here are vital. In the *Shukert case* there was an absolute, indefeasible right vesting in the beneficiaries at once. In the instant case no such right was acquired. Under Trusts No. 1831 and 3048, the right of the settlor to revoke existed until his death; under Trusts No. 4477, 4478, 4479, 4480, and 4481, the right of the settlor, with the respective beneficiaries, to revoke also existed. In the *Shukert case* the trust terminated on a certain preestablished and definite date in no way connected with the death of the settlor. In the instant case in all of the trusts the transfer of the corpus to the beneficiary is dependent upon the death of the settlor.

As the Court in the *Shukert case* based its opinion on the presence there of two factors not existing here, it is submitted that the reasoning of that case is in no way applicable.

There would seem little doubt but that the words of the statute were intended to contemplate just such trusts as those here involved. The statute includes in the gross estate of decedents "any interest • • • with respect to which he has at any time created a trust, • • • intended to take effect in possession or enjoyment at or after his death."

The words "to take effect" when qualified as they are by the further words "in possession or enjoyment" can only mean to ripen from an interest under a trust into a full estate, and as this ter-

mination of the trust estate can only occur "at or after his death" it follows that the estate taking effect must be the estate of the beneficiary. It is equally obvious that the estate of the beneficiary intended must be the full estate coupled with a present enjoyment and unfettered by the trust relationship, as it must be "in possession or enjoyment." These latter words refer not to the income which may or may not be had prior to the settlor's death, nor to any technical or future or contingent title, but to the corpus of the estate actually possessed or enjoyed. This conclusion seems justified by the holding of this Court in *Vanderbilt* v. *Eidman*, 196 U. S. 480.

From the language used and the whole scheme of the statute what Congress obviously intended was to provide a measure for the tax which would operate equally upon all testamentary dispositions of property, whether by will or intestacy or only testamentary in effect.

It is submitted, then, that the statute can only be interpreted as applying to trusts which confer upon its beneficiaries vested or contingent remainders which merge into full estates, actually "in possession or enjoyment" "at or after his (the settlor's) death."

Applying this construction of the statute to the seven trusts in the case at bar, makes manifest the direct application of the section. In Trusts Nos.

1831 and 3048 the founder not only deprived the beneficiaries of the possession, enjoyment, and income of the trust property during his life, but also provided that the income should be paid to him. A somewhat similar trust was held to be within the purview of Section 402 (c) of the Revenue Act of 1918 in *McCaughn* v. *Girard Trust Company*, 11 F. (2d) 520. Further, the founder reserved the absolute and unrestricted right to revoke the trusts, thus depriving the beneficiary of any assured interest in the property at any time, and retaining complete dominion over the property. *Bullen* v. *State of Wisconsin*, 240 U. S. 625.

In the remaining five trusts (Trusts Nos. 4477, 4478, 4479, 4480, and 4481), although the founder did not reserve to himself the income from the trust property, he did retain a substantial control over the trust property, including a power, in conjunction with others, to revoke, which power was in four cases out of the five actually exercised. The determination of the classes in whom the remainder interests should vest could not be made until after the founder's death, so that until that time no member or prospective member of the class had any assured right or interest in the trust fund or one of which disposition could be made. Moreover, the interests which the life beneficiaries took under the trust instrument were not absolute rights to designated shares of the income with power to alienate in advance of payment. The income became the bene-

ficiary's absolute property only upon receipt by him, because the trust instruments provided that the beneficiaries should have no power to "anticipate, assign, or otherwise dispose of or encumber their respective interests" in these trusts.

This conclusion finds confirmation in a consideration of the opinion of this Court in *Nichols* v. *Coolidge*, 274 U. S. 531. In the *Coolidge case* the trust was similar to the instant ones save that it was there irrevocable. This Court, in view of the fact that the trust was created prior to the adoption of Section 402 (c) of the Revenue Act of 1918, held that section, so far as it attempted to reach back, to be unconstitutional.

That this Court considered the constitutionality of the section establishes a fair inference that it considered the trusts there involved to be within the purview of the section; for "a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401; *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 390; *Lewellyn* v. *Frick*, 268 U. S. 238, 251. As the section considered by the Court in the *Coolidge case* is identical with the one here involved, and as the trusts, so far as concerns the time in which they "take effect in possession or enjoyment," offer no material differences, it is submitted that the *Coolidge case* is strongly indicative of the

fact that the seven trusts here involved do come within the purview of Section 402 (c) of the Revenue Act of 1918.

As was said in the *Coolidge case* the power of Congress to include such transfers in an Act taxing transfers by death arises from the necessity of preventing evasion and is limited by that necessity. By the term "evasion" it is not intended to imply any moral turpitude. A transfer, however innocently made, which operates as a future disposition of property in fact, and regardless of the intent or the motive of the maker, evades the tax. Such transfers have the effect, through the creation of artificial estates, either of retaining in the settlor, during his life, an interest in or a dominion over the subject of the trust or of controlling the usage of property in the future. The right to create such estate is no more inherent than is the privilege of transmitting by death. See *Keeney* v. *New York*, 222 U. S. 525.

Congress enacted Section 402 (c) of the Revenue Act of 1921 to reach such artificial estates as are created by the trusts in the instant case, under which the settlor either retained the income during his life or a dominion over the trust property, and under which the corpus vested in the beneficiary only at or after the settlor's death.

II

CONGRESS HAS POWER TO INCLUDE IN A DECEDENT'S GROSS ESTATE THE VALUE OF PROPERTY IN RESPECT OF WHICH HE HAS CREATED A TRUST PRIOR TO THE PASSAGE OF THE ACT, RESERVING TO HIMSELF THE INCOME FOR LIFE AND AN UNRESTRICTED POWER OF REVOCATION

The settlor created Trust No. 1831 in 1903 (R. 47) and Trust No. 3048 in 1910 (R. 50), and under both of these trusts he reserved to himself without qualification the income during his life and the power to revoke.

In the *Coolidge case* this Court held that the presence in Section 402 (c) of the Revenue Act of 1918 of the clause "(whether such transfer or trust is made or created before or after the passage of this Act)" brought trusts created prior to the passage of the Act within its terms. It then declared the Act to be unconstitutional as to those trusts which had been created prior to the passage of the Act.

The same clause appears in the section here under consideration and is manifestly of the same scope and intent. Obviously, as to such a trust as was involved in the *Coolidge case*, the clause is invalid, but, it is submitted, it is not thereby to be considered as stricken from the statute.

Section 1403 of the Revenue Act of 1921 provides that the unconstitutionality of any provision of the Act as applied to any particular person or circumstances shall not invalidate the provisions as

applied to other persons and circumstances. *Hill* v. *Wallace*, 259 U. S. 44, 71; *National Life Insurance Company* v. *United States*, 48 Sup. Ct. 591.

When the features which impelled this Court to declare it unconstitutional in that case are removed, little objection to it can validly be made.

While the court below, applying the *Coolidge case*, held the Act unconstitutional, it apparently overlooked the fact that those features which impelled the *Coolidge* decision were not here present.

The basis of the decision that the statute is arbitrary, capricious, and burdensome as applied to a transaction entirely completed before its passage is that "* * * the conveyance by Mrs Coolidge to trustees was in no proper sense testamentary, and it bears no substantial relationship to the transfer by death. * * *" (p. 540). And further (p. 542):

> * * * the arbitrary, whimsical, and burdensome character of the challenged tax is plain enough. An excise is prescribed, but the amount of it is made to depend upon past lawful transactions, not testamentary in character and beyond recall. * * *

An examination of the two trusts here involved, in the light of that statement, will demonstrate that while "an excise is prescribed, the amount of it" is not "made to depend upon past lawful transactions," but upon transactions "testamentary in character" and, up to the time of settlor's death, not "beyond recall."

The general characteristics of a testamentary disposition, putting aside matters of form, are that the property go over at the death of the grantor and that during his lifetime the grantor have the power of using and disposing of the property. A revocable transfer is "ambulatory," and where, as here, the donor reserves the income during his lifetime the transaction is practically the exact equivalent of a disposition by will. *Farmers' Loan & Trust Co.* v. *Bowers*, 15 F. (2d) 706; *Matter of Schmidlapp*, 236 N. Y. 278.

Such a transaction is not completed at the time the trust is created and is not beyond recall. *Saltonstall* v. *Saltonstall*, 276 U. S. 260.

The value of the trust property is not included in the gross estate merely because the creation of the trust was intended to take effect in possession or enjoyment at or after death, but because in addition to its being so intended it is in fact and by virtue of the complete dominion over it retained by the grantor substantially his property. It may be applied by him during his lifetime to such purposes as he sees fit; it may be repossessed by him at any time he desires, and until his death he has the complete and exclusive enjoyment of it.

One of the objections made by this Court to applying the section to the trust in the *Coolidge case* was that the tax was measured by the value, as of the time of the settlor's death, of property transferred and over which the settlor's interest had ter-

minated prior to his death. This may clearly be distinguished from the instant case. In the *Coolidge case* the interest had ceased long before the settlor's death. In the instant case that interest subsisted up to the moment of his death and the value is measured as of the time of the death which terminated the interest.

We, therefore, submit that the arbitrary, capricious, and burdensome characteristics apparent in the *Coolidge Trust*, which alone established the fact that the Act exceeded the power of Congress to tax and amounted to a confiscation of property forbidden by the Fifth Amendment, are not present in the instant case.

The conclusion of this Court in the *Saltonstall case*, *supra*, fully sustains this contention. In that case the settlor, in the years 1905 to 1907, had created certain trusts, under which the income was to be paid to him during his life, or, at his option, to accumulate, and the right to revoke was retained by him, acting jointly with one of the trustees. Under a law of the State of Massachusetts (Mass. Acts, 1909, c. 527, Section 8) enacted subsequently to the founding of these trusts, a tax was laid on the transfer of property passing to anyone in the exercise of a power of appointment. Under this Act, as amended, a tax was laid upon the trust property, at the death of the settlor, in 1920. This was resisted and action brought, and the right to levy the tax affirmed by the Massachusetts Supreme Judicial Court. Upon writ of error from this Court consid-

eration was given only to the question whether the subsequent enactment was offensive to the Constitution, as depriving of property without due process.

This Court, in holding the Act valid and not unconstitutional, said (p. 271):

> So long as the privilege of succession has not been fully exercised it may be reached by the tax. [Citing authorities.] And in determining whether it has been so exercised technical distinctions between vested remainders and other interests are of little avail, for the shifting of the economic benefits and burdens of property, which is the subject of a succession tax, may even in the case of a vested remainder be restricted or suspended by other legal devices. A power of appointment reserved by the donor leaves the transfer, as to him, incomplete and subject to tax. * * *

In the case at bar the tax is laid on the transmission, which can not be completed until the cessation of the interest of the settlor. In the *Saltonstall case* the tax is laid on the privilege of succession, which this Court holds incomplete so long as not fully exercised. Neither the cessation of interest in the one case nor the exercised privilege of succession, in the other, can occur until the death of the settlor. As the tax applies on the privilege of succession made complete by the settlor's death, it would seem to follow that the tax could apply equally well on the

transmission under the instant trusts where the interest only ceases at the settlor's death.

Looking at the matter in another light, the property, as distinguished from an estate in the property, passed and was transmitted at death, and upon this transmission the tax is imposed. The tax so imposed was reckoned upon the value of the interest which passed, for while it is true that the reservation of a power to revoke does not create any technical estate in the property, it is nevertheless, equally true that the reservation of such a power gives the grantor complete dominion over the property. Such dominion justifies Congress in treating the decedent's interest as equivalent to a fee for the purposes of the taxing statute, for "to make a distinction between a general power and a limitation in fee, is to grasp at a shadow while the substance escapes." *See Bullen* v. *State of Wisconsin*, 240 U. S. 625, 630.

In addition to the reservation of the power which is tantamount to the ownership of the fee, the decedent here had the actual and exclusive enjoyment of the property during his lifetime. One warning was had by the passage of the Act that if interest and dominion over the property were retained it would be taxed. There was full opportunity to do as was done in the *Coolidge* case and relinquish that interest before death. This was not done, but, to the contrary, the property was retained within his dominion and the enjoyment of it until the settlor died. The Act thus did not impose "an unexpected

liability that if known might have induced those concerned to avoid it and to use their money in other ways" (*Lewellyn* v. *Frick*, 268 U. S. 238, 252), but the settlor, with regard to Trusts Nos. 1831 and 3048, had ample opportunity and power to make any disposition of the property which he wanted after the Act was passed, and it is submitted that, in imposing a death duty upon a transaction, which was in its nature testamentary and in which his interest was retained up to the time of his death, there is nothing arbitrary, whimsical or burdensome.

III

TRUSTS CREATED IN 1919, DURING THE EFFECTIVENESS OF SECTION 402 (C) OF THE REVENUE ACT OF 1918, WHICH IS IDENTICAL WITH THE ONE HERE INVOLVED, MAY BE INCLUDED IN THE GROSS INCOME OF A DECEDENT'S ESTATE UNDER SECTION 402 (C) OF THE REVENUE ACT OF 1921, AS THE REPEAL OF THE EARLIER SECTION AND ITS REENACTMENT IN THE REVENUE ACT OF 1921 DOES NOT CREATE A NEW LAW, ATTEMPTING TO REACH BACK, BUT IS A CONTINUATION OF THE OLD.

The preceding argument disposes of Trusts Nos. 1831 and 3048, which were created prior to the passage of any Federal estate tax law.

It remains to dispose of those trusts created after the passage of such a law, but, as to which the settlor did not die until after that law had been repealed and another identical law was in effect.

In 1919, while the Revenue Act of 1918 was in force, the settlor created Trusts Nos. 4477, 4478, 4479, 4480 and 4481.

The Revenue Act of 1918 contains a section identical with the one here involved. (See Section 402 (c), Revenue Act of 1918.) Prior to the death of the settlor the Revenue Act of 1918 was repealed and that of 1921 enacted. This latter Act contained Section 402 (c), here involved. If the trusts created in 1919 are within the intended scope of Section 402 (c), as heretofore discussed (see Point I, this brief), the only inquiry as to these five trusts is as to whether the repeal of the Revenue Act of 1918 and the reenactment of the pertinent section in the Revenue Act of 1921 created a new law which attempted to include "property transferred by a decedent prior to its passage," as declared unconstitutional by this Court in the *Coolidge case*.

The repealing clause of the Revenue Act of 1921 (Section 1400 (a)) does not contain any express reservation with respect to taxes which would have been imposed under the 1918 Act had it not been repealed. The Act discloses an intention on the part of Congress to hold as a part of a decedent's gross estate under the Revenue Act of 1921 the same transfers which would have been a part of his gross estate had the 1918 Act not been repealed, for it expressly includes transfers, "whether made before or after" the passage of the Act.

Although the statute involved in the *Coolidge case* was held to be unconstitutional in so far as it required that there should be included in the gross

estate the value of property transferred by a decedent prior to its passage, that decision was reached because the settlor's interest had completely terminated prior to his death and the only justification urged for the inclusion was the mere fact that possession or enjoyment was postponed. The decision, however, can not be extended to prevent the inclusion of property transferred by a prior trust in cases where an interest ceases by death and furnishes an occasion for the tax. In other words, the time of the creation of the trust is not important if, in fact, the trust is of testamentary character.

However, even if mere retroactivity were sufficient to prevent the inclusion of property previously transferred, we submit that, properly considered, retroactivity does not actually exist. The estate tax is a part of the scheme of taxation embraced in the Act of 1918 as well as in the Act of 1921. Both are in reality "Codes." It was repealed not because the tax was to be discontinued but because a new "Code" was issued. The effect of such a repeal and reenactment has been before the courts many times, and it is held that, where there is an express repeal of an existing statute and a reenactment of it at the same time, the reenactment neutralizes the repeal so far as the terms of the new Act are the same as those of the repealed Act. The old law continues without interruption.

In the case of *Bear Lake Irrigation Co.* v. *Garland*, 164 U. S. 1, which presented a similar question, this Court said (p. 11):

> Upon comparing the two acts of 1888 and 1890 together, it is seen that they both legislate upon the same subject, and in many cases the provisions of the two statutes are similar and almost identical. Although there is a formal repeal of the old by the new statute, still there never has been a moment of time since the passage of the act of 1888 when these similar provisions have not been in force. Notwithstanding, therefore, this formal repeal, it is, as we think, entirely correct to say that the new act should be construed as a continuation of the old with the modification contained in the new act. This is the same principle that is recognized and asserted in *Steamship Co.* v. *Joliffe*, 2 Wall. 450, 459. In that case there was a repeal in terms of the former statute, and yet it was held that it was not the intention of the legislature to thereby impair the right to fees which had arisen under the act which was repealed. As the provisions of the new act took effect simultaneously with the repeal of the old one, the court held that the new one might more properly be said to be substituted in the place of the old one, and to continue in force, with modifications, the provisions of the old act, instead of abrogating or annulling them and reenacting the same as a new and original act.

See also *Lewis' Sutherland Statutory Construction*, Vol. 1, 2d Ed., Sec. 238; *Lamb* v. *Powder River Live Stock Co.*, 132 Fed. 434; *Great Northern Ry. Co.* v. *United States*, 155 Fed. 945; *Steamship Co.* v. *Joliffe*, 2 Wall. 450.

In effect these trusts were created subsequently to the passage of the section. The settlor had full notice of the effect of Section 402 (c) of the Revenue Act of 1918 upon them when they were created. He can not be presumed to have made them with a knowledge that he would outlive the Act. Can the tax, then, be defeated merely because of the accident of the repeal of the Act, under which the tax would have applied, prior to his own death? The equity here is on the side of the Government.

IV

CONGRESS HAS POWER TO INCLUDE IN DECEDENT'S GROSS ESTATE THE VALUE OF PROPERTY WITH RESPECT TO WHICH A TRUST HAS BEEN CREATED DURING THE EFFECTIVENESS OF A PRIOR IDENTICAL SECTION WITH THAT HERE INVOLVED WHERE SOME PRESENT INTEREST AND A QUALIFIED RIGHT TO REVOKE IS RETAINED BY THE SETTLOR ALTHOUGH THE INCOME IS PAYABLE TO OTHERS THAN THE SETTLOR

Having shown that no valid objection can be made on the ground of retroactivity, it is now necessary to determine whether or not the five trusts of 1919 (Trusts Nos. 4477–4481, incl.) are testamentary in character and escape the condemnation of the *Coolidge case* on that score.

It is believed that these five trusts not only come within the purview of Section 402 (c) of the Revenue Act of 1921 but that the limitations which circumscribe them, and, particularly, the interest retained by the settlor throughout his life, serve to so differentiate them from those in the *Coolidge case* that that decision can have no effect here.

This Court in that case determined the section to be unconstitutional in that it attempted to tax a past lawful transaction which was not testamentary in effect. Such a state of facts is not here present. The transaction in this case is testamentary. Under it the settlor retains an interest up to the moment of his death, and the passage to the beneficiary of the corpus can not take place until the settlor's death.

This Court has described the Federal estate tax as being one imposed upon an "interest which ceased by reason of death." *U. M. C. A. v. Davis*, 264 U. S. 47, 50; *Edwards v. Slocum*, 264 U. S. 61. An instrument creating a trust may be so limited in its scope that its execution and delivery do not operate to terminate this interest. The transmission is not complete as to the founder until he has parted not only with the title but also with the use, enjoyment, and dominion.

The settlor by virtue of the five trusts retained to a large degree the management and control and had a substantial interest in the trust property until his death. The trustee was to be "governed by any

instructions or directions in writing given to it by said party of the first part in regard to the management, sale, or investment of any part of the said trust estate." (R. 4, 18, 26, 33, 41.) The trustee was required to execute proxies as requested by the founder, thus enabling the founder to vote the stock in his discretion. (R. 4, 19, 26, 34, 41.) The trustee was required to "observe and be governed by any instructions or requests in relation thereto (to real estate) made by an instrument in writing, signed by" the founder. (R. 5, 19, 27, 34, 42.) In case of the resignation or disability of any trustee the founder retained the power to appoint a successor. (R. 7, 21, 29, 36, 44.) He had a restricted power to alter, change, or modify the terms of the trust. (R. 7, 21, 29, 37, 44.) He thus retained, for his lifetime, complete dominion over the property as distinguished from the beneficiaries' interest in the income and corpus of the trust. This dominion ceased at his death, and it is submitted that this cessation was the cessation of an interest sufficient to support the tax. (See Sec. 402(e) under which the possession of a general power of appointment over property is considered sufficient interest. This section has been held valid in *Pennsylvania Company, etc.* v. *Lederer*, 292 Fed. 629, and *Whitlock-Rose* v. *McCaughn*, 21 F. (2d) 164.)

Such a power—to alter, change, or modify—is tantamount to a power of revocation. Just as

"the beneficiary's acquisition of the property is equally incomplete whether the power be reserved to the donor or another" (*Saltonstall* v. *Saltonstall, supra*), so the donor's interest has not ceased so long as he has a power of revocation, whether that power be reserved to himself alone or in conjunction with others.

In Trust No. 4477 the power to revoke or amend was retained by the settlor, acting in conjunction with a majority of the five named beneficiaries, or a majority of the survivors of them. Necessarily, if they predeceased him the power became his alone. As to Trusts Nos. 4478, 4479, 4480, and 4481, the power was retained to revoke or amend, with the concurrence of the single beneficiary in each of them named. The death, in any case, of any one of these beneficiaries gave to the settlor the absolute right. This is true, because even upon the death of all the named beneficiaries the trusts still remain operative, but the successors do not share the right to alter, change, or modify.

These trusts, which control the course of property after the owner's death, have a pronounced effect on the public revenues; for, in such cases, it is not only the present transfer of property from one to another which is relieved from tax, but many future transfers. Although the case at bar is not a striking instance since there is but one transmission after decedent's death controlled by the terms of the trust, it is easy to see how under similar trusts

the course of property might be controlled for many years so that not only the tax on the transfer from this decedent to the objects of his bounty would be defeated, but, also, future transmissions for several generations might be tax free. Thus it could easily happen that large estates, and these estates are those which produce the revenue, might pass from father to son, to grandson, and perhaps still further, free and clear from any estate tax, although the object of all death duties is to tax such transmissions.

The attention of the Court is called to the fact that the corpus of a similar trust was held not to be a part of a decedent's estate under Section 402 (c) of the Revenue Act of 1918 by the Circuit Court of Appeals for the Second Circuit in the recent case of *Farmers' Loan and Trust Company, Trustee*, v. *Frank K. Bowers, Collector*, unreported (copy in Appendix B). It should be noted that the trust in this case was created prior to the passage of the first Federal estate tax law in 1916, but that this phase of the question was not considered at all by the court. This opinion of the Circuit Court of Appeals for the Second Circuit only affects the question involved in this case with respect to the trusts of 1919 (Trusts Nos. 4477, 4478, 4479, 4480, 4481). The Government submits, however, that that decision is erroneous for the same reasons that have been urged in this brief against the decision of the court below in the instant case.

CONCLUSION

It is respectfully submitted that the judgment of the United States Circuit Court of Appeals for the Seventh Circuit was erroneous and should be reversed.

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APPENDIX A

The first regulations published under the estate tax Act as Treasury Decision 2378 provides in Art. IV, subdivision (2):

> All property transferred by decedent during his lifetime, but in contemplation of, or intended to take effect, at his death. This includes not only property transferred by an instrument effecting a final disposition at the transferor's death, but transfers of any kind, including gifts and sales that were not bona fide—i. e., made for an adequate consideration in money or money's worth—where it can be established that such transfers were made in contemplation of death. The law provides not only that all such transfers of any portion of decedent's property shall be included in the gross estate, but that all such transfers of material value made within two years prior to death shall be presumed to have been made in contemplation of death, and the burden of proving that they were not made in such contemplation and securing their exemption from tax is placed upon the beneficiary. Wherever, therefore, a collector or agent shall have knowledge of such a gift, "sale," or other transfer he shall require that it be returned as a part of the decedent's gross estate. All executors and administrators having knowledge of such transfers as are described in this paragraph are required by the law to set forth the facts upon their return of the estate (Form —).

The next edition of these regulations issued in pamphlet form on October 10, 1916, and not published as a Treasury Decision, carries the same

language. In the May, 1917, edition also issued in pamphlet form and not published as a Treasury Decision no reference to such transfers is made.

The 1918 Edition of Regulations 37 (also called the 1919 Edition), published as Treasury Decision 2910, provides in Art. 24:

> *Reservation of income.*—A transfer is taxable where the grantor reserves to himself during life the income of the property transferred. In such a case the transfer of the principal takes effect in possession and enjoyment after the death of the grantor, and the value of the entire property should be included in the gross estate. Where the grantor reserves a proportionate part of the income, only a corresponding proportion of the property should be included in the gross estate, unless the transfer was made in contemplation of death. If, for example, he reserves one-half of the income, the value of one-half of the property transferred should be included in the gross estate. If he reserves an annuity, so much of the property as is necessary to produce the annuity should be included in the gross estate. Where the property does not produce income, its value as of the date of the decedent's death should be ascertained, and so much of this sum as is necessary to produce the annuity should be included in the gross estate. A transfer is taxable in accordance with these principles whether the grantor makes a reservation of the annuity out of the property conveyed, or exacts from the grantee an agreement to pay the annuity. A gift of the principal of a trust fund which takes effect at or after the decedent's death is taxable, although the income during the decedent's life is payable to some one other than himself. Example:

> The decedent transfers property to his son, the latter agreeing to pay the income to his mother during the decedent's life. The transfer to the son is taxable.

The same provision is found in Article 24 of the 1921 Edition of Regulations 37 published as Treasury Decision 3145. Prior to these regulations Treasury Decision 20444 had been issued, but the facts stated are so meagre as to make it of little value for the purposes in hand.

In Regulations 63, 1922 Edition, relating to the 1921 Act, published as Treasury Decision 3384, Article 17 provides that—

> * * * The value of property, where title was so transferred by the decedent before September 9, 1916, is to be included in his gross estate if his death occurred after the effective date of the Revenue Act of 1918, but is not to be included if he died prior thereto.

and Article 19 provides under the caption "Transfers Intended to Take Effect at or After Death" as follows:

> *General.*—All transfers at any time made by the decedent, other than bona fide sales for a fair consideration in money or money's worth, which were intended to take effect in possession or enjoyment at or after his death, are taxable, and the value of the property so transferred, as of the date of the decedent's death, must be returned as a part of the gross estate.

Articles 17 and 19 of Regulations 63 were, after the decision of this Court in the *Coolidge case*, amended in accordance with the Bureau's interpretation of the *Coolidge* decision, so that thereafter—

All transfers made by the decedent subsequent to September 8, 1916, other than bona fide sales for a fair consideration in money or money's worth, which were intended to take effect in possession or enjoyment at or after his death, are taxable, and the value, as of the date of the decedent's death, of property or interest so transferred must be returned as part of the gross estate.

Where a transfer (whether made before or after the passage of the revenue act of 1916) was intended to take effect in possession or enjoyment at or after the decedent's death, and the enjoyment of the property or the interest transferred was subject at the date of the decedent's death to change by the exercise of any power to alter, amend, or revoke, the value, as of the date of the decedent's death, of the property or interest so transferred must be returned as a part of the gross estate.—Art. 19, Regulations 63, as amended August 12, 1927, T. D. 4064.

This is the rule in effect at the present time.

APPENDIX B

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Farmers' Loan and Trust Company (a corporation) as Trustee under a Deed of Trust made by William Waldorf Astor (now deceased) dated May 25th, 1916, plaintiff-appellant, against Frank K. Bowers, Collector of Internal Revenue for the Second District of New York, defendant-appellee

Before: Manton, Swan, and A. N. Hand, Circuit Judges.

MANTON, *Circuit Judge:*

On May 25, 1916, three years before his death, William Waldorf Astor, a British subject, made a deed of trust in a very large amount. Plaintiff in error was named as trustee, and there was transferred to it stocks, bonds and cash to be held by it upon the trusts thereby imposed. On December 26, 1916, and again on August 15, 1919, modifications of the deed of trust were made, to which we shall refer. The plaintiff in error, as executor of the Astor Estate, by virtue of an American will dated September 16, 1919, filed an estate-tax return showing a gross estate of the decedent subject to tax imposed by the 1918 Act. This will disposed of holdings in the United States other than the funds referred to in the deed of trust. The tax thereon was paid. In the return reference was made and information given as to the property conveyed by

this deed of trust. The Commissioner on July 11, 1922, ruled that the *corpus* of this trust fund constituted a part of the decedent's estate subject to tax under § 402 of the Act of February 24, 1919 (40 Stat. 1097), which provides:

> That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated— * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this act), except in case of a bona fide sale for a fair consideration in money or money's worth. * * *
>
> (e) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of bona fide sale for a fair consideration in money or money's worth.

The tax resulting from this assessment was paid under duress, and this action seeks to recover it.

The court below granted judgment for that part of the tax arising from the inclusion as part of the estate subject to estate tax, of Liberty Bonds in the principal amount of $1,331,540.40—this because these bonds were exempt from an estate tax by reason of the provisions of the Victory Liberty Loan Act, and denied further relief.

The deed of trust, as made on May 25, 1916, provided that the funds be invested and reinvested by the trustee and the income be distributed to one or more of the issue of the settlor and the wife or husband of such issue, and such charities as the settlor should by instrument in writing instruct and direct, and in default of such direction, to be paid to such charities as the trustee in its absolute discretion might think proper. No income was reserved to the settlor. It provided that at the death of the settlor the principal then in the hands of the trustee should be distributed to and among the issue of the settlor in such shares or manner provided by the laws of New York as the settlor might by will or codicil specifically referring to such power, appoint, and in default of such appointment, to and among his issue then surviving in equal shares *per stirpes* and not *per capita*. As to such of the issue, however, who were in being at the date of the settlement but who were minors at the time of the settlor's death, it continued to be held in trust during their respective minorities. It further provided that the settlor, but only with the written consent of the trustee, might modify or revoke the indenture and trust thereby created, either in whole or in part. The plaintiff in error was named and has since acted as trustee.

On December 28, 1916, the settlor delivered to the trustee an instrument which modified this deed of trust so as to provide for the payment out of the trust fund of all taxes, if any were payable, on or by reason of the death of the settlor "upon or in respect of said trust fund" and such English death duties as may be imposed upon his estate. Again, on August 15, 1919, the settlor executed and

delivered an instrument by which he, with the consent in writing of the trustee, as required by the indenture of May 25, 1916, modified the trust to the extent only of rearranging the shares in the corpus going to the settlor's issue. It provided that upon the death of the settler without exercising the power of appointment reserved to him in the indenture, the trustee should divide the capital of the trust fund then in its hands, into two portions of equal value, provided the settlor during his lifetime should have paid to the trustee of a certain English indenture of covenant and settlement made on the marriage of his son John Jacob with Violet Mary Mercer Nairne, the sum of four million dollars agreed to be paid by the settlor to John Jacob Astor, and if all such sums had not been paid, that then one portion of the corpus should be less than the net value of the other portion by so much of the principal of four million dollars as should not have been so paid by the settlor during his life, and should distribute that portion of the capital of the corpus to all or any of the sons of the settlor's eldest son, Waldorf Astor, living at the time of the death of the settlor, and, if more than one, in equal shares; in default of any such son living at that time, then to the persons constituting the issue of the settlor as referred to in the instrument.

The other of the two portions of the corpus was to be distributed to John Jacob Astor unless he should predecease the settlor and in that event, to certain issue of the settlor as provided. The shares of the persons who were infants at the date of the indenture of 1916 and who were under the age of 21 years at the time of the settlor's death, were to be held in trust during minority. At the time of

his death, the settlor left two sons and four grandsons, the latter sons of Waldorf Astor. One grandson was born after May 25, 1916. When the settlor died, he left an American, an English and an Italian will and in neither did he exercise the limited power of appointment reserved to him by the deed of trust.

The question of this appeal is whether the corpus of this trust fund was properly held to be within Sec. 402 of the Taxing Act as a part of the decedent's net estate subject to the estate tax. Had there been no modification on August 15, 1919, after the passage of the taxing act, the cases of *Nichols* v. *Coolidge*, 274 U. S. 531 and Frew V. Bowers, 12 Fed. (2d) 625 would dispose of the question against the government's claims. But the argument is that the trustee was directed to apply the income during the life of the settlor to and among his next of kin "as the grantor by written appointment shall direct" and while no time was fixed therefor, if there was a default of such appointment, the trustee during the life of the settlor was to apply the income to such charities and in such amounts as the trustee in its absolute discretion deemed proper and after his death distribution of the trust fund was to be made to the issue of the settlor then surviving, in equal shares *per stirpes* and not *per capita*.

Further, that the settlor reserved to himself the right at any time to revoke the trust in whole or in part; also to appoint "such new and other trusts powers or provisions as said Grantor may think fit in favor of or for the benefit of the Grantor himself or any one or more of the issue of the said grantor and any husband or wife of any such is-

sue." Acknowledging that written consent of the trustee was necessary, the argument proceeds that the power of removal of the trustee might be exercised and thus full and complete authority rested with the settlor to make the change without the trustee; that in any case the consent of the trustee was a mere formality which in nowise acted as a limitation on the general power of revocation. It is said that the corpus of the trust fund passed on the donor's death to certain beneficiaries by reason of the supplemental indenture of August 15, 1919. *Nichols* v. *Coolidge*, *supra*, is distinguished on the theory that here there is a reserved power to modify.

By the indenture of May, 1916, the settlor parted with all control over the corpus of the trust except a conditional power to revoke and then only with the consent of the trustee. The trustee had obligations with respect to the trust property and the rights of the beneficiaries. Its consent could be granted only with due regard for such duties. Thus the settlor was beyond the power legally to control. In the *Nichols* v. *Coolidge case*, the grantee gave back a terminable lease with provisions for annual renewal and by it the grantor could occupy the premises as long as she chose. But the court held that Mrs. Coolidge's rights must be governed by the terms of the lease. In *Saltonstall* v. *Same*, 276 U. S. 260, where the court considered a Massachusetts succession tax as distinguished from a transfer tax, it said: "A power of appointment reserved by the donor leaves the transfer, as to him, incomplete and subject to a tax." *Bullen* v. *Wisconsin*, 240 U. S. 625.

But nothing in the *Saltonstall case* indicates that the transfer would be incomplete as to the settlor, who reserves a power of revocation conditional on a consent, and beyond his legal power to control. Here no suggestion is made that there was an interest to evade the tax by depriving the settlor of legal power to control and placing it within the power of a friendly trustee to grant or refuse. A power to revoke is not a property right nor an interest in property. *Jones* v. *Clifton*, 101 U. S. 225; *Hill* v. *Nichols*, 18 Fed. (2d) 139; *Reinecke* v. *Northern Trust Co.*, 24 Fed. (2) 91; *In re Dolan's Estate*, 279 Pa. St. 582; *Stone* v. *Hackett*, 12 Gray (Mass.) 227. The power of revocation is perfectly consistent with the creation of a valid trust. Title passes to the donee and remains vested for the purpose of the trust even though there be a right to revoke it.

The power to revoke is not evidence of an intent to postpone the legal enjoyment, existence, or effect of that which may perhaps thereafter be brought to an end for the reason that the enjoyment and possession actually passes to the beneficiaries. Until the right to revoke is exercised an estate exists by virtue of the transfer. *People* v. *Northern Trust Co.*, 289 Ill. 475; *In re Dolan's Estate*, *supra*. Such a power is not transferable or descendable nor may it be alienated or passed by a will. It is personal to the holder. *Lewellyn* v. *Frick*, 268 U. S. 238; *Jones* v. *Clifton*, *supra*; *Reinecke* v. *Northern Trust Co.*, *supra*. When in May, 1916, the settlor made his indenture he transferred his title and also all possession and enjoyment. His reserved powers were not conditions of the vesting

of the estate, but merely conditional limitations. Such has been the rule under the transfer tax in New York State referring to a transfer intending to take effect in possession and enjoyment at or after death. *Matter of Miller*, 236 N. Y. 290; *Matter of Carnegie*, 203 App. Div. 91, affd. 236 N. Y. 517. But where, in adition to the power to revoke, there is reserved to the grantor the income during life and the power to pass upon and dictate as to investments and reinvestments, the transfer tax is payable. *Matter of Schmidlapp*, 236 N. Y. 278. Moreover, the consent of the trustee to revoke must be honest and in accord with the legal rights of the *cestui que trustent*. It is always subject to review by a court of equity.

The May, 1916, indenture provided that the remainder, in the absence of the exercise of the limited power of the settler to appoint by will, was to go to his issue *per stirpes* and not *per capita*. The August, 1919, modification provided that the principal at the time of his death should remain in trust for such grandchildren as were under age until their majority to the extent of their interest therein, and should then be distributed among them. The modifications made by this instrument did not change the fact that the trust had been created on May 25, 1916, and that the transfer had occurred then, and nothing that he could do thereafter would alter or change that transaction or that trust unless he revoked in *toto* the trust instrument and subsequently created a new and different trust. The modification gave to some of the original remaindermen larger proportions than that vested in them on May 25, 1916, and took away from others of the original remaindermen portions

vested in them at that time. However, all such changes in the rights of remaindermen were made within the group originally fixed and no persons outside that group profited thereby. John Jacob Astor, an original remainderman, continued throughout until the death of the settlor, to be vested with one-third of the *corpus* of the trust fund. His interest was never reduced. If the settlor had completely revoked the trust, repossessed himself of the property and made a new settlement, he would have made a transfer or created a trust within the meaning of § 402 (c), but by the 1919 modification he changed the interest of his issue; he did not transfer his property. Section 402 (c) refers to the extent of "any interest," and this refers to an interest of the decedent. *United States* v. *Fields*, 255 U. S.

Congress made plain by Section 402(e) that the exercise of such a power of appointment was not within Section 402(c) for by express provision it refers to a general power of appointment when made by a deed executed in contemplation or intended to take effect in possession or enjoyment at or after death. The power to appoint the remainderman by will to and among the issue of the settlor is a limited power of appointment and in view of the principle of *United States* v. *Field*, *supra*, is not taxable. It is not an interest in property. Congress imposed a tax specifically by the act of 1918 (Section 402-e) on the exercise of general powers of appointment. But he did not exercise it and the property did not pass by the exercise of any power of appointment under any of his wills. It will be noted that it was by deed

and not by will that, on August 15, 1919, the settlor, within the direct limitations of the trust instrument of May 25, 1916, exercised in favor of his issue, with the trustee's consent, this limited power. This was but the culmination of the original plan decided upon in May, 1916, to settle his property on his children and grandchildren. His purpose was to give outright the property to the sons of his eldest son and his younger son. An absolute and unconditional power to revoke a trust is treated as equivalent to a general power to appoint. *Bullen v. Wisconsin*, 240 U. S. 625. But here there is no such absolute and unconditional power. The trustee's consent was necessary for the settlor's exercise of the power.

It therefore required the action of both. The power could not be exercised by the settlor alone and therefore it was not a general power exercised by the decedent within the meaning of the statute. Congress intended only to tax the general power which the settlor might have exercised himself or treated the property as a part of his estate. It is apparent Congress made such a distinction between a general power exercised by a decedent and a limited power requiring more than the act or will of the settlor. In the instant case, if the settlor had appointed himself as beneficiary it might well be that the trustee could have lawfully refused consent to such a proposal in the interest of the beneficiaries. Therefore, we hold that a "general power of appointment exercised by the decedent" refers to a power exercised solely by him, and that §402(e) of the act does not justify a tax on the power of appointment reserved to this settlor. A general power of appointment contemplates a power of no

restrictions as to who may be appointees and the exercise of that general power referred to in the statute which is subject to the tax, is the normal power of appointment or one actually expressed and not something merely analogous to a power of appointment. The statute seems clear enough and this transaction must come within its terms before the tax can be exacted. *Gould* v. *Gould*, 245 U. S. 151.

These views make it unnecessary for us to consider the question of the unconstitutionality of the taxing act as argued or the other claims for the exemptions from taxation of parts of the *corpus* of the trust.

This tax was erroneously exacted and the plaintiff in error is entitled to a judgment for the amount it paid.

Judgment reversed.